No. 05-450

In The Supreme Court of the United States

GAY ELLEN COON,

Petitioner,

v.

JAMES MOORE COON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF
SOUTH CAROLINA

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

Donald B. Clark
Counsel of Record
DONALD B. CLARK, LLC
49 Immigration Street
Suite 204
Charleston, SC 29403
(843) 720-8866

Counsel for Petitioner

Alex B. Cash
ROSEN, ROSEN
& HAGOOD, LLC
134 Meeting Street
Suite 200
Post Office Box 893
Charleston, SC 29402
(843) 577-6726

Counsel for Petitioner

THE LEX GROUP • 1108 East Main Street • Suite 1400 • Richmond, Virginia 23219
(804) 644-4419 • (800) 856-4419 • Fax: (804) 644-3660 • www.thelexgroup.com

QUESTION PRESENTED

Does the Uniformed Services Former Spouses' Protection Act, 10 U.S.C. § 1408 (1998 and Supp. 2004), limit the subject matter jurisdiction of State courts to 50 percent of disposable retired pay?

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BASIS FOR JURISDICTION

The order denying the rehearing of the case was entered by the South Carolina Supreme Court on July 8, 2005. (App. 24a) This petition for writ of certiorari is filed within ninety days from that date.

The statutory provision which confers jurisdiction on this Court is 28 U.S.C. § 1257(a):

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had . . . where any title, right, privilege, or immunity is specially set up or claimed under the Constitution . . . or statues of . . . the United States.

CONSTITUTIONAL PROVISIONS AND STATUTES

The statutory provision upon which Petitioner's claim is based is the Uniformed Services Former Spouses' Protection Act (USFSPA), 10 U.S.C. § 1408 (1998 and Supp. 2004).

10 U.S.C. § 1408(c) provides in pertinent part:

> (c) Authority for court to treat retired pay as property of the member and spouse.
>
> (1) Subject to the limitations of this section, a court may treat disposable retired pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court.

10 U.S.C. § 1408(e) provides in pertinent part:

> (e) Limitations.
>
> (1) The total amount of the disposable retired pay of a member payable under all court orders pursuant to subsection (c) may not exceed 50 percent of such disposable retired pay.

STATEMENT OF THE CASE

The family court in Charleston County, South Carolina awarded the Respondent 100% of Petitioner's military pension for nine years. Thereafter, Petitioner moved pursuant to Rule 60(b), South Carolina Rules of Civil Procedure, to set aside the award. On April 10,

2001, the family court entered an order providing in pertinent part:

> The provisions of the Uniformed Services F ner Spouse's Protection Act, 10 U.S.C. §)8, limits this Court's jurisdiction as to military retirement pay to a total amount not to exceed 50% of the disposable retired pay. For this reason, any order of the Court which attempts to allocate any sum in excess of the said 50% is void for lack of this Court's jurisdiction.

The South Carolina Court of Appeals reversed the family court in its published decision cited above. On a petition for certiorari, the South Carolina Supreme Court affirmed the Court of Appeals, as modified, in its published decision cited above. The order denying rehearing was entered on July 8, 2005.

LEGAL ARGUMENT

I. The Uniformed Services Former Spouses' Protection Act limits the subject matter jurisdiction of State courts to 50 percent of disposable retired pay.

Absent an express grant of authority from Congress, all military retirement benefits are beyond the jurisdiction of the State courts pursuant to the Supremacy Clause, U.S. Const. Art. VI, cl. 2. *McCarty v. McCarty*, 453 U.S. 210, 101 S. Ct. 2728 (1981). In McCarty, this Court noted several important

governmental objectives Congress had in enacting the military retirement system and determined that the application of even limited State community property concepts conflicted with this statutory scheme - - a statutory scheme which Congress alone could change:

> Nonetheless, Congress may well decide, as it has in the Civil Service and Foreign Service contexts, that more protection should be afforded a former spouse of a retired service member. This decision, however, is for Congress alone. We very recently have re-emphasized that in no area has the Court accorded Congress greater deference than in the conduct and control of military affairs.

Id. at 238, 101 S. Ct. at 2741.

In response to McCarty, Congress enacted the USFSPA, which granted State courts jurisdiction to determine whether military retirement benefits should be considered marital property under their State laws. This authority flowed to the State courts from Congress, and not from any construction of State marital property laws: "Because pre-existing federal law, as construed by this Court, completely pre-empted the application of state community property law to military retirement pay, Congress could overcome the McCarty decision only by enacting an affirmative grant of authority giving the States the power to treat military retirement pay as community property." Mansell v. Mansell, 490 U.S. 581, 588, 109 S. Ct. 2023, 2028 (1989).

In 1990, Congress amended the USFSPA. Subsection (c) of 10 U.S.C. § 1408 is now entitled, "*Authority* for [State] court to treat retired pay as property of the member and spouse." (Emphasis added.) It provides: "*Subject to the limitations of this section*, a court may treat disposable retired pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court." 10 U.S.C. § 1408(c)(1998). (Emphasis added.) The limitations of section 1408 include the following: "The total amount of the disposable retired pay of a member payable under all court orders pursuant to subsection (c) *may not exceed 50 percent of such disposable retired pay.*" 10 U.S.C. § 1408(e)(1). (Emphasis added.)

10 U.S.C. § 1408 has spawned a hodgepodge of wildly differing theories and results by State courts as to how disposable retired pay may be treated under State domestic relations laws and has resulted in radically different treatment of the disposable retired pay of retired military personnel depending on which State court adjudicates their rights. See, e.g., White, "The Uniformed Services Former Spouses' Protection Act: How Military Members are at the Mercy of Unrestrained State Courts," 9 Roger Williams U. L. Rev. 289 (Fall 2003).

The South Carolina Supreme Court in the instant case has gone so far as to declare that it needed no grant of subject matter jurisdiction from Congress *at all* and that, in fact, "The USFSPA neither confers

subject-matter jurisdiction on any court nor takes jurisdiction from any court." Coon v. Coon, 364 S.C. 563, 567, 614 S.E.2d 616, 618 (2005). The South Carolina Supreme Court noted: "We respectfully disagree with the Supreme Court of Alaska, which recently held that the fifty-percent limitation is jurisdictional. Cline v. Cline, 90 P. 3d 137, 152-54 (Alaska 2004)." Id. at 568, 614 S.E.2d at 618. In addition to the Alaska Supreme Court, the Court of Appeals of Minnesota has also recently held, in an unpublished opinion, that the USFSPA "ordinarily limits state courts' subject matter jurisdiction over a recipient's 'disposable retired pay,' disallowing court orders that direct the military to disburse more than half of the military pension income to an divorced spouse." Overby v. Overby, 2004 Minn. App. Lexis 1045 (filed September 14, 2004).

CONCLUSION

Because 10 U.S.C. § 1408 has received inconsistent interpretation and application in the State courts, it falls to this Court to resolve the matter. The provisions of 10 U.S.C. § 1408 clearly and unequivocally limit the subject matter jurisdiction of State courts to 50 percent of disposable retired pay, and the decision of the South Carolina Supreme Court should therefore be reversed.

Respectfully submitted,

Donald B. Clark
49 Immigration Street
Suite 204
Charleston, SC 29403
(843) 720-8866

Alex B. Cash
Rosen, Rosen
& Hagood, LLC
134 Meeting Street
Suite 200
P.O. Box 893
Charleston, SC 29402
(843) 577-6726

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Gay Ellen Coon, Respondent,
v.
James Moore Coon, Petitioner.

Opinion No. 25991

SUPREME COURT OF SOUTH CAROLINA

364 S.C. 563; 614 S.E.2d 616; 2005 S.C. LEXIS 149

May 4, 2005, Heard
May 31, 2005, Filed

[ENTERED: May 31, 2005]

SUBSEQUENT HISTORY: Rehearing denied by *Coon v. Coon, 2005 S.C. LEXIS 206 (S.C., July 8, 2005)*

PRIOR HISTORY: Appeal From Charleston County, H. E. Bonnoitt, Jr., Family Court Judge. *Coon v. Coon, 356 S.C. 342, 588 S.E.2d 624, 2003 S.C. App. LEXIS 148 (S.C. Ct. App., 2003)*

DISPOSITION: AFFIRMED AS MODIFIED.

LexisNexis(R) Headnotes

COUNSEL: Alex B. Cash, and Donald Bruce Clark, both of Charleston, for Petitioner.

Ronald L. Richter, Jr., of Charleston, for Respondent.

JUDGES: JUSTICE PLEICONES. TOAL, C.J., MOORE, WALLER, BURNETT, JJ., concur.

OPINION BY: PLEICONES

OPINION:

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

JUSTICE PLEICONES: This is a divorce case. We granted a writ of certiorari to review *Coon v. Coon, 356 S.C. 342, 588 S.E.2d 624 (Ct. App. 2003)*, in which the Court of Appeals reversed the family court's decision to vacate a domestic-relations order. We affirm.

FACTS

Pursuant to the parties' settlement agreement, the family court entered an order that apportioned Mr. Coon's United States Department of Defense (DOD) retired pay. Under the order, Mrs. Coon was to receive one hundred percent of Mr. Coon's "disposable retired pay"[1] for nine years, and thereafter receive fifty percent. The order provided that the DOD plan administrator pay Mrs. Coon directly.

The order was never sent to the plan administrator, however. All of the retired pay was paid directly to Mr. Coon, who, in turn, remitted the money to Mrs. Coon. Under this arrangement, Mr.

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[1] "Disposable retired pay" is "the total monthly retired pay to which a member [of the military] is entitled less" certain amounts listed in the statute. *10 U.S.C.A. § 1408(a)(4) (1998).*

Coon was deemed the recipient of all of the retired pay and was thus responsible for all of the taxes.

At some point, Mr. Coon increased the amount of federal income tax withholding from the retired pay, causing a decrease in the net amount remitted to Mrs. Coon. Mrs. Coon petitioned for a rule to show cause why Mr. Coon was not in contempt of the family court's order. In response, Mr. Coon moved the family court pursuant to Rule 60(b)(4), SCRCP, to vacate the portion of the order distributing the retired pay. Mr. Coon argued that under the Uniformed Services Former Spouses' Protection Act (the USFSPA or the Act),[2] the family court lacked subject-matter jurisdiction to order that Mrs. Coon receive more than fifty percent of Mr. Coon's disposable retired pay. Accordingly, Mr. Coon argued, the order was void. The family court agreed and vacated the order. Mrs. Coon appealed.

The Court of Appeals reversed, holding that the family court had subject-matter jurisdiction to apportion all of Mr. Coon's disposable retired pay, although the court lacked "authority" to distribute more than half to Mrs. Coon. In other words, the family court committed a substantive error but not a jurisdictional one, so Mr. Coon was not entitled to relief under Rule 60(b)(4). The Court of Appeals

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[2] *10 U.S.C. § 1408 (1998 and Supp. 2004).*

ordered the reinstatement of the order and remanded for further proceedings.[3]

ISSUE

Whether the family court had subject-matter jurisdiction to distribute to Mrs. Coon more than fifty percent of Mr. Coon's disposable retired pay.

ANALYSIS

We agree with the Court of Appeals that the family court committed an error of law but did not lack subject-matter jurisdiction.

"On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding [if] ... the judgment is void." Rule 60(b)(4), SCRCP. A judgment of a court without subject-matter jurisdiction is void. *Thomas & Howard Co. v. T.W. Graham and Co., 318 S.C. 286, 291, 457 S.E.2d 340, 343 (1995).* Subject-matter jurisdiction is the "power to hear and determine cases of the general class to which the proceedings in question belong." *Dove v. Gold Kist, 314 S.C. 235, 237-38, 442 S.E.2d 598, 600 (1994).* By statute, the family court has subject-matter jurisdiction to decide divorce

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[3] The further proceedings contemplated by the Court of Appeals relate to the rule to show cause and to a subsequent motion filed by Mrs. Coon to reform the family court's order. Because we affirm the Court of Appeals' decision on the merits, we also affirm the decision to remand.

actions and apportion marital property. *S.C. Code Ann. §§ 20-7-420(2) and 20-7-473 (Supp. 2004).*

In *McCarty v. McCarty, 453 U.S. 210, 101 S. Ct. 2728, 69 L. Ed. 2d 589 (1981),* the United States Supreme Court held that the military-retirement statutes then in force prohibited states from dividing military retired pay pursuant to state community-property laws. *McCarty* applied with like force to equitable-distribution states such as South Carolina. See *Brown v. Brown, 279 S.C. 116, 118, 302 S.E.2d 860, 861 (1983)* (citing *Bugg v. Bugg, 277 S.C. 270, 286 S.E.2d 135 (1982)*). In response to *McCarty,* Congress enacted the USFSPA.

The USFSPA permits any court of "competent jurisdiction" to "treat disposable retired pay payable to a [service] member ... either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court." *10 U.S.C.A. §§ 1408(a)(1)* and *(c)(1) (1998).* In other words, states have a choice whether to treat disposable retired pay as marital property. South Carolina has chosen to do so. See *Tiffault v. Tiffault, 303 S.C. 391, 392, 401 S.E.2d 157, 157 (1991); Brown, 279 S.C. at 118, 302 S.E.2d at 861.*

A court's authority, however, is subject to the following limitation: "The total amount of the disposable retired pay of a member payable under all court orders pursuant to subsection (c) may not exceed 50 percent of such disposable retired pay." *10 U.S.C.A. § 1408(e)(1).* As the Court of Appeals noted, this limitation applies whether the non-military spouse

receives payments directly from the Department of Defense, from the service-member spouse, or a combination of the two. *Coon, 356 S.C. at 349-50, 588 S.E.2d at 628*.

Mr. Coon argues that the fifty-percent limitation prevents state courts from exercising subject-matter jurisdiction over the protected half of disposable retired pay. We disagree. The limitation supplants state domestic-relations law pursuant to the Supremacy Clause of the United States Constitution,[4] but it does not pre-empt state-court subject-matter jurisdiction.[5] See, e.g., *In re the Marriage of Curtis v. Curtis, 7 Cal. App. 4th 1, 9 Cal. Rptr. 145 (Cal. Ct. App. 1st Dist. 1992)* (holding that neither the *McCarty* decision nor the USFSPA involves subject-matter jurisdiction); *In re the Marriage of Mansell v. Mansell, 217 Cal. App. 3d 219, 265 Cal. Rptr. 227 (Cal. Ct. App. 5th Dist. 1989)*[6]

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[4] *U.S. Const. art. VI.*

[5] We respectfully disagree with the Supreme Court of Alaska, which recently held that the fifty-percent limitation is jurisdictional. *Cline v. Cline, 90 P.3d 147, 152-54 (Alaska 2004).*

[6] This California case was on remand from *Mansell v. Mansell, 490 U.S. 581, 109 S. Ct. 2023, 104 L. Ed. 2d 675 (1989).* There, the United States Supreme Court held that the USFSPA prevented "military retirement pay waived by the retiree in order to receive veterans' disability benefits" from being apportioned pursuant to state community-property (or equitable-distribution) laws. The reason was that in the Act Congress did not grant the states permission to apportion disability benefits. Thus, the pre-emption found in *McCarty* remained with respect to those benefits.

(same), cert. denied, *Mansell v. Mansell*, 498 U.S. 806, 111 S. Ct. 237, 112 L. Ed. 2d 197 (1990); *Evans v. Evans*, 75 Md. App. 364, 541 A.2d 648 (1988) (same). The USFSPA neither confers subject-matter jurisdiction on any court nor takes jurisdiction from any court. See *Brown v. Harms*, 863 F. Supp. 278, 280-81 (E.D. Va. 1994) (holding that federal courts are given no federal-question jurisdiction by the Act and finding that "the Act does no more than make clear that courts of competent jurisdiction, namely courts that already have subject matter jurisdiction from some proper source extrinsic to the Act, may treat a military pension" as marital property).

As the Court of Appeals noted, the USFSPA expresses no intention on Congress's part to pre-empt state-court jurisdiction. *Coon*, 356 S.C. at 351, 588 S.E.2d at 629. Further, we agree with the Court of Appeals that the use of the term "jurisdiction" in the 1990 House Report on the subsection (e)(1) amendment is unpersuasive. See H.R. Rep. No. 101-665, at 3005 (1990); *Coon*, 356 S.C. at 350, 588 S.E.2d at 628 (finding that by "jurisdiction," the House meant "authority").[7]

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[7] Even the United States Supreme Court, in an unrelated matter, has recently stated: "'Jurisdiction' ... is a word of many, too many, meanings. ... Clarity would be facilitated if courts and litigants used the label 'jurisdictional' ... only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority." *Kontrick v. Ryan*, 540 U.S. 443, 454-55, 124 S. Ct. 906, 915, 157 L. Ed. 2d 867, 879 (2004) (parentheses in original).

We disagree, however, with the Court of Appeals' suggestion that the USFSPA's savings clause, *section 1408(e)(5)*, "further undermines any argument that Congress explicitly directed the fifty-percent limitation is jurisdictional ...." *Coon, 356 S.C. at 351-52, 588 S.E.2d at 629*. As already stated, the Act does not address subject-matter jurisdiction in any respect. It follows that the savings clause does not impact the jurisdiction issue one way or the other.

As stated above, the Court of Appeals' holding was correct. The Act does not pre-empt state-court jurisdiction, so the family court's jurisdiction is strictly a matter of South Carolina law. In this case, the family court did not exceed its jurisdiction. See *S.C. Code Ann. §§ 20-7-420(2)* and *20-7-473 (Supp. 2004); Dove, 314 S.C. at 237-38, 442 S.E.2d at 600*. That the family court erred in failing to follow pre-emptive federal law does not change this result. Thus, Mr. Coon is not entitled to relief under Rule 60(b)(4), SCRCP.

CONCLUSION

The family court's order is not void for want of subject-matter jurisdiction, so the family court erred when it vacated the order. We therefore affirm the Court of Appeals' decision to reverse the vacatur and remand the case to the family court.

AFFIRMED AS MODIFIED.

TOAL, C.J., MOORE, WALLER, BURNETT, JJ., concur.

LEXSEE 356 S.C. 342

Gay Ellen Coon, Appellant,
v.
James Moore Coon, Respondent.

Opinion No. 3678

COURT OF APPEALS OF SOUTH CAROLINA

356 S.C. 342; 588 S.E.2d 624; 2003 S.C. App. LEXIS 148

April 9, 2003, Heard
September 22, 2003, Filed

[ENTERED: SEPTEMBER 22, 2003]

SUBSEQUENT HISTORY: Rehearing denied by *Coon v. Coon, 2003 S.C. App. LEXIS 201 (S.C. Ct. App., Nov. 21, 2003)*
Affirmed by *Coon v. Coon, 2005 S.C. LEXIS 149 (S.C., May 31, 2005)*

PRIOR HISTORY: Appeal From Charleston County. H.E. Bonnoitt, Jr., Family Court Judge.

DISPOSITION: REVERSED AND REMANDED.

LexisNexis(R) Headnotes

COUNSEL: Ronald L. Richter, Jr., of Charleston, for Appellant.

Alex B. Cash, of Charleston, for Respondent.

JUDGES: HOWARD, J. STILWELL, J., and STROM, Acting Judge, concur.

OPINION BY: HOWARD

OPINION: HOWARD, J.: This is an action by Gay Ellen Coon (Wife") to enforce the payment of retirement benefits previously ordered by the family court. James Moore Coon ("Husband") moved pursuant to Rule 60(b)(4), South Carolina Rules of Civil Procedure, to vacate the previously entered final order. Husband asserted the family court lacked subject matter jurisdiction to order payment of more than fifty percent of his disposable military retirement pay to his spouse because to do so violated the Uniformed Services Former Spouse's Protection Act ("USFSPA"), *10 U.S.C.A. § 1408 (1998)*. The family court agreed and vacated the prior order. Wife appeals. We reverse and reinstate the family court's prior order.

FACTS/PROCEDURAL HISTORY

In July 1999, the family court approved a settlement agreement between Husband and Wife, acknowledging the Husband's military retirement account was a marital asset subject to division. In accordance with the agreement, the order provided that Wife was entitled to one-hundred percent of the proceeds of Husband's military retirement account for nine years, and following the nine-year period, "the plan administrator will be directed to divided the proceeds equally between the parties."

No Qualified Domestic Relations Order ("QDRO") was sent to or approved by the Secretary of Defense in accordance with the USFSPA. Instead, Husband deposited the full amount of his retirement pay into a jointly held bank account, and Wife used the funds.

As a result, Husband was deemed the recipient of the funds and was responsible for the taxes. He did not withhold the proper amount of taxes in 1999 and part of 2000, so he withheld additional taxes in 2000 to cover out-of-pocket expenses he had incurred the previous year.

Wife then filed this enforcement action, arguing Husband violated the final order of July 1999 by increasing the amount of withholding deducted from the retirement benefit. Husband responded by filing a motion to vacate the original order approving the agreement pursuant to Rule 60(b)(4), arguing the order Wife sought to enforce was void for lack of subject matter jurisdiction because it allocated more than fifty percent of his disposable military retirement pay in violation of the USFSPA. The family court heard Husband's Rule 60(b)(4) motion and held Wife's rule to show cause in abeyance. The family court concluded:

The provisions of the [USFSPA] limit[] this Court's *jurisdiction* as to military retirement pay to a total amount not to exceed fifty percent of the disposable retired pay. For this reason, any order of the Court which attempts to allocate any sum in excess of the said fifty percent is void for lack of this Court's jurisdiction. (emphasis added).

On April 2, 2001, the family court sent its order to the clerk of court and to the parties' attorneys. Wife served her motion to reconsider on Husband on April 6, 2001, and on the clerk of court on April 9, 2001. However, she waited until she received a "clocked" copy of her motion from the clerk of court, in August 2001, before she served her motion on the presiding judge. On October 3, 2001, the family court issued an order reaffirming its ruling. In its order, the family court also indicated Wife's motion to reconsider was untimely because she did not provide the presiding judge with a copy of the motion within ten days of filing. Wife served and filed her notice of appeal to this Court on November 1, 2001. This appeal follows.

LAW/ANALYSIS

I. Timeliness of Appeal

Initially, Husband asserts Wife's appeal to this Court is untimely because she failed to comply with the requirements of Rule 59(g), South Carolina Rules of Civil Procedure. Husband contends because Wife failed to serve a copy of her motion to reconsider on the family court within ten days of filing it with the clerk of court, the time for her appeal to this Court has expired. We disagree with Husband's reading of Rule 59(g) and find Wife's appeal to be timely.

Rule 59(g) requires "a party filing a written motion under this rule [to] provide a copy of the motion to the judge within ten (10) days after the filing of the motion." The notes to Rule 59 state the 1998 amendment adding subsection (g) was "intended to

help insure that the judge is promptly *notified* that the motion has been filed." (emphasis added). As this Court discussed in Gallagher v. Evert, "there is no indication that the failure to transmit a copy of the motion to the circuit court affects the tolling provision of Rule 203(b)(1), South Carolina Appellate Court Rules.[1] Therefore, the time for filing the notice of appeal did not begin to run until after the circuit court denied the motion." *353 S.C. 59, 63, 577 S.E.2d 217, 219 (Ct. App. 2002).* In accordance with Rule 59(g) and this Court's decision in Gallagher, we hold Wife was not required to file her notice of appeal until after the family court issued its order denying her motion to reconsider. Thus, her appeal to this Court is timely.

II. USFSPA & Jurisdiction

Wife contends the family court erred by vacating its prior order. Wife asserts the family court had subject matter jurisdiction because the retirement account is marital property. We agree and hold the limitation on the percentage of retirement benefits the family court is permitted to allocate speaks to the family court's authority and not its subject matter jurisdiction. Thus, we reinstate the family court's prior order.

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[1] Rule 203(b)(1) provides: "When a timely . . . motion to alter or amend the judgment . . . has been made, the time for appeal for all parties shall be stayed and shall run from receipt of written notice of entry of the order granting or denying such motion."

A. Definition of Void

Initially, we note the posture of this case. Husband brought this motion pursuant to Rule 60(b)(4), South Carolina Rules of Civil Procedure, asserting the family court's prior final order approving the parties agreement was *void* for lack of subject matter jurisdiction. Thus, our inquiry is limited solely to determining the family court's subject matter jurisdiction in this matter.

"A void judgment is one that, from its inception, is a complete nullity and is without legal effect and must be distinguished from one which is merely 'voidable.'" *Thomas & Howard Co. v. T.W. Graham and Co., 318 S.C. 286, 291, 457 S.E.2d 340, 343 (1995)* (quoting *46 Am. Jur.2d Judgments § 31* (1994)). "The definition of void under the rule . . . encompasses . . . judgments from courts which lacked subject matter jurisdiction." *McDaniel v. U.S. Fid. & Guar. Co., 324 S.C. 639, 644, 478 S.E.2d 868, 871 (Ct. App. 1996)* (internal quotations omitted); see also *Ross v. Richland County, 270 S.C. 100, 103, 240 S.E.2d 649, 650 (1978)* (holding that if "'a court is without jurisdiction of the subject matter, any action with respect to such a cause, other than to dismiss it, is absolutely void'" (quoting *Fox v. Board of Regents of Univ. of Mich., 375 Mich. 238, 134 N.W.2d 146, 148 (Mich. 1965)*)).

However, irregularities which do not involve jurisdiction do not render a judgment void. *Thomas & Howard Co., 318 S.C. at 291, 457 S.E.2d at 343.*

> [Furthermore,] there is a wide difference between a want of jurisdiction in which case the court has no power to adjudicate at all, and *a mistake in the exercise of undoubted jurisdiction in which case the action of the trial court is not void although it may be subject to direct attack on appeal.* A judgment will not be vacated for a mere irregularity which does not affect the justice of the case, and of which the party could have availed himself, but did not do so until judgment was rendered against him.

Id. (emphasis added) (internal citations omitted). Moreover, when a court acts with proper subject matter jurisdiction but takes some action outside of its authority, the party against whom the act is done must object and directly appeal. See *Cosgrove v. Butler, 1 S.C. 241, 243 (1869)* ("If such departures be not excepted to, the Court may consider objection to them as *waived*. And it may be asserted, as a general rule, that where there is no want of jurisdiction . . ., [the Court's] judgment will be binding, even although affected by irregularity which would have defeated the proceeding if objection had been timely and properly made." (emphasis added)). Thus, if the family court had jurisdiction over the military retirement account, its original order is not void.

B. Jurisdiction v. Authority

"Subject matter jurisdiction refers to the court's 'power to hear and determine cases of the general class to which the proceedings in question belong.'" *Watson v. Watson, 319 S.C. 92, 93, 460 S.E.2d 394, 395 (1995)* (quoting *Dove v. Gold Kist, Inc., 314 S.C. 235, 237-38, 442*

S.E.2d 598, 600 (1994)). South Carolina Code Annotated section 20-7-420(2) (Supp. 2003) grants the family court the exclusive jurisdiction "to hear and determine actions: for divorce a vinculo matrimonii . . . and in other marital litigation between the parties, and for settlement of all legal and equitable rights of the parties in the actions in and to the real and *personal property of the marriage*." (emphasis added); cf. *S.C. Code Ann. § 20-7-473* (Supp. 2003) (stating the family court does not have jurisdiction to apportion nonmarital property).

In this case, the disputed property is a military retirement account, and we are required to examine the federal authority creating the property to determine its status. The USFSPA specifically permits state courts "*subject to the limitations of this section*, . . . [to] treat disposable retired pay . . . either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court." *10 U.S.C. § 1408(c)(1) (1998)* (emphasis added). Clearly, Congress has chosen to permit the states to determine independently whether to treat military retirement benefits as marital property.

Thus, we must turn to the applicable South Carolina authority to determine the status of a military retirement account in this State. In Tiffault v. Tiffault, our supreme court held military retirement benefits "constitute an earned property right which, if accrued during the marriage, is subject to equitable distribution." *303 S.C. 391, 392-93, 401 S.E.2d 157, 158 (1991)*. Therefore, pursuant to Congress' invitation, our state has determined military retirement accounts are marital property. However, were the law as settled as

this concise statement from our supreme court might indicate, the current inquiry would not likely be before us.

Notwithstanding the holding in Tiffault, Husband argues the family court's subject matter jurisdiction is limited by the 1990 amendment to *10 U.S.C. § 1408(e)(1) (1998)*[2]. A brief review of the history of the USFSPA is necessary to an understanding of this issue.

In McCarthy v. McCarthy, the United States Supreme Court ruled that the states had no authority to order the equitable distribution of military retirement benefits. *453 U.S. 210, 223, 69 L. Ed. 2d 589, 101 S. Ct. 2728 (1981).* In direct response to McCarthy, the USFSPA was enacted, and from its inception limited the percentage of disposable military retirement pay that could be allotted to a non-military spouse. The initial language restricted the amount the government administrator could pay to a non-military spouse to fifty percent. In construing this language, some states applied the fifty-percent limitation only to direct payments from the administrator but not to the aggregate amount that could be awarded to the non-

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[2] The amendment states "the total amount of the disposable retired pay of a member payable under all court orders pursuant to subsection (c) may not exceed fifty percent of such disposable retired pay." *10 U.S.C. § 1408(e)(1) (1998). Subsection (c)* is entitled, "Authority for [state] court to treat retired pay as property of the member and spouse." *10 U.S.C. § 1408(c) (1998).*

military spouse. See, e.g., *Grier v. Grier, 731 S.W.2d 931, 932-33, 30 Tex. Sup. Ct. J. 416 (Tex. 1987)* (holding the USFSPA did not limit the amount of retirement benefits that could be apportioned under Texas community property law but did limit the percentage of the military retirement benefit that was subject to direct payment); *Deliduka v. Deliduka, 347 N.W.2d 52, 55 (Minn. Ct. App. 1984)* (holding "a state court wishing to award a former spouse more than fifty percent of disposable retired pay must order direct government payments and payments by the member of the military to the spouse").

To address the various state court interpretations of the fifty-percent restriction, the 1990 amendment changed the restriction to apply to all court-ordered divisions of disposable military retirement pay pertaining to former spouses. *10 U.S.C. § 1408(e)(1) (1998).* The 1990 amendment to the Act changed the manner in which the payment was restricted. After the 1990 amendment, the fifty-percent restriction on payment of disposable military retirement pay was reworded to apply to divisions of retirement benefits made under any court order pertaining to former spouses. See H.R. Rep. No. 101-665, at 3004-05 (1990).

The 1990 House Report stated that the amendment to *subsection (e)(1)* "reflected a public policy judgment on the appropriate role of the federal government in limiting state court jurisdiction in divorce cases involving military retired pay [and] is consistent with the balancing of state and federal interests that has been the hallmark of this law since its

inception." H.R. Rep. No. 101-665, at 3005 (emphasis supplied by Husband). The report addressed the amendment's language by explaining that the provision stating "the aggregate amount of retired pay that would be payable to [former spouses] would not exceed fifty percent of the service member's disposable retired pay" applied both when a court orders the government administrator to pay the amount directly to the non- military spouse and when the amount is paid indirectly to the non-military spouse through the retired spouse. H.R. Rep. No. 101-665, at 3006; see *In re MacMeeken, 117 B.R. 642, 644-45 (Bankr. D. Kan. 1990)* (indicating the pre-1990 *subsection (e)(1)* failed to clearly express that a non-military spouse should never be awarded more than fifty percent of the retired spouse's disposable military retirement pay, but rather, it appeared Congress intended for the fifty percent limit to apply *solely* to awards paid directly by the benefits administrator to the non-military spouse).

Based upon this report, Husband argues the limitation is jurisdictional, and therefore, the order was void. Cf. *Bowen v. Bowen, 327 S.C. 561, 566, 490 S.E.2d 271, 273 (Ct. App. 1997)* (holding once the family court determined property was not marital property, the family court had no jurisdiction to address the property's ownership or "deal with [the property] in any way"). We disagree with Husband's reading of the 1990 amendment to *subsection (e)(1)*.

It is generally recognized that the presumption of concurrent federal and state jurisdiction over cases involving federal law "can be rebutted by an explicit statutory directive, by unmistakable implication from

legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests." *Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 478, 69 L. Ed. 2d 784, 101 S. Ct. 2870 (1981);* see *Hairston v. Travelers Cas. & Sur. Co., 232 F.3d 1348, 1349-50 (11th Cir. 2000)* (quoting *Gulf Offshore); Resolution Trust Corp. v. Foust, 177 Ariz. 507, 869 P.2d 183, 188 (Ariz. Ct. App. 1993)* (adopting the reasoning of Gulf Offshore). However, there is nothing in the language of the Act, the amendment, or the legislative history indicating an intention to preempt state court subject matter jurisdiction. Having reviewed the entire House Report and in light of the history of the statute, we conclude the portion of the legislative history to which Husband refers does not evince an "unmistakable implication" to limit a state's court *subject matter jurisdiction* with respect to allocating more than fifty percent of a spouse's disposable military retirement pay. *Gulf Offshore, 453 U.S. at 478.* In light of its context and usage, we conclude the use of the term "jurisdiction" in the report refers to this state's authority to award more than fifty percent of a spouse's disposable military retirement pay.

The USFSPA's savings clause further undermines any argument that Congress explicitly directed that the fifty-percent limitation is jurisdictional, thereby preempting traditional state rules regarding finality of judgments. The savings clause states: "A court order which itself . . . provides for the payment of an amount which exceeds the amount of disposable retired pay available for payment because of the limit set forth in [*subsection (e)(1)*] . . . shall not be considered to be irregular on its face solely

for that reason." *10 U.S.C. § 1408(e)(5)* (1998). Congress anticipated state courts would issue orders awarding more than fifty percent of the disposable military retirement pay. However, in light of this prospect, Congress chose not to explicitly state that these orders would be void for lack of subject matter jurisdiction. Instead, this subsection purports to "save" these orders by indicating they should not be deemed irregular.

We have found no reported case in this or any other jurisdiction ruling that when a court awards more than fifty percent of a spouse's disposable military retirement pay that court lacks *subject matter jurisdiction*. Instead, the cases addressing this issue have held that an award of more than fifty percent of disposable military retirement pay is subject to direct attack on appeal and is reversible error. See, e.g., *In re Marriage of Bowman, 972 S.W.2d 635, 637-39 (Mo. Ct. App. 1998)* (*reversing, on direct appeal,* an award of more than fifty percent of a spouse's disposable military pay because it violated *section 1408(e)(1)*, reasoning "'the USFSPA permits a state court to consider the *gross* value of retirement benefits in computing the value of the marital estate. However, the USFSPA prohibits a state court from awarding the non-military spouse [*17] the right to collect more than fifty percent of the *net* monthly retirement payment.'") (quoting *Beesley v. Beesley, 114 Idaho 536, 758 P.2d 695, 699 (Idaho 1988)*) (emphasis in Beesley)).

Although we have found no rulings directly on point, this Court's decision concerning military disability pay under the provisions of the USFSPA is instructive. See *Price v. Price, 325 S.C. 379, 480 S.E.2d 92*

(Ct. App. 1996). In Price, the family court approved a settlement agreement in which the husband agreed to pay to his wife a certain amount of his total military retirement benefits, which included his disability pay - an item not considered to be disposable military retirement pay under the USFSPA. *325 S.C. at 380, 480 S.E.2d at 92*. Subsequently, the husband unilaterally reduced his payments to his wife because he had waived an additional amount of his retirement pay in favor of disability pay. The wife sought to compel the husband to make monthly payments according to the settlement agreement. *Id. at 381, 480 S.E.2d at 92-93*. Relying on Mansell v. Mansell, husband sought a reduction in the payments to his wife. *490 U.S. 581, 589-95, 104 L. Ed. 2d 675, 109 S. Ct. 2023 (1989)* (holding the USFSPA does not give state courts the authority to treat total military retirement benefits as property subject to equitable distribution). The family court granted the wife's motion to compel and this Court affirmed.

Although this Court acknowledged federal authority limiting the family court's consideration of disability benefits as marital property subject to equitable distribution, this Court held husband should not be permitted to complain the family court erred in enforcing the terms of the agreement he willingly entered into with his wife. *Price, 325 S.C. at 383, 480 S.E.2d at 94*. Notably, this Court concluded the federal limitation did not divest the family court of subject matter jurisdiction. Id. Thus, this Court affirmed the settlement agreement. See *McLellan v. McLellan, 33 Va. App. 376, 533 S.E.2d 635, 637-39 (Va. Ct. App. 2000)* (affirming the denial of the husband's motion to vacate

a prior court order because it approved a settlement agreement awarding the wife a portion of the husband's military disability pay in violation of *section 1408*); *Forney v. Minard, 849 P.2d 724, 729 (Wyo. 1993)* (refusing to vacate the trial court's order awarding wife one-hundred percent of her husband's military retirement pay even though the trial court ordered the benefits administrator to pay wife directly, finding the USFSPA's limitations do not restrict state jurisdiction to only fifty percent of the disposable retirement pay).

For the foregoing reasons, we conclude the family court erred in vacating its prior order for lack of subject matter jurisdiction.

CONCLUSION

The family court's order vacating its prior order is **REVERSED,** and the original family court order approving the settlement agreement, which awarded Wife one-hundred percent of the proceeds of Husband's military retirement account for a nine-year period, is reinstated. We remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

STILWELL, J., and STROM, Acting Judge, concur.

THE SUPREME COURT OF SOUTH CAROLINA

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

[ENTERED: JULY 8, 2005]

JULY 8, 2005

Donald Bruce Clark, Esquire
49 Immigration St., Ste. 204
Charleston, SC 29403

Alexander Blair Cash, Esquire
Rosen Rosen & Hagood, LLC
P.O. Box 893
Charleston, SC 29402

Re: Coon, Gay Ellen v. Coon, James Moore

Dear Counsel:

The Court has issued the following Order on your Petition for Rehearing in the above matter:

"Petition for Rehearing is denied.

s/ Jean H. Toal C.J.

s/ James E. Moore J.

s/ John H. Waller, Jr. J.

s/ E.C. Burnett, III J.

s/ Costa M. Pleicones J.

July 8, 2005."

The remittitur is today being forwarded to the lower court.

Very truly yours,

s/ Daniel E. Shearouse
CLERK

DES/dmh

cc: Ronald L. Richter, Jr., Esquire

2

No. 05-450

In The

Supreme Court of the United States

JAMES MOORE COON,

Petitioner,

v.

GAY ELLEN COON,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of South Carolina

BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI

RONALD L. RICHTER, JR.
RICHTER LAW FIRM, P.A.
800 Wappoo Road
Charleston, SC 29407
(843) 573-9900

Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

Should the Court accept *certiorari* to review a South Carolina Supreme Court opinion denying a military retiree from challenging the enforceability of a marital property settlement agreement nearly one and a half years after the military retiree freely and voluntarily entered into the settlement agreement, consented to the jurisdiction of the family court for the State of South Carolina to approve and accept the settlement agreement and performed without objection to the settlement agreement until a subsequent change of heart? In the event that *certiorari* is accepted, did the USFSPA create jurisdiction to determine the disposition of military retirement benefits as a part of an action to allocate marital property? In the event that *certiorari* is accepted, does the Court subscribe to a theory of fractional jurisdiction whereby it would agree with the Petitioner that the USFSPA granted the States only partial jurisdiction to consider the proper disposition of a military retiree's pension? In the event that *certiorari* is accepted and the Court subscribes to a theory of fractional jurisdiction to allocate military benefits in the context of marital property litigation, with whom and where does jurisdiction lie for that portion of a marital property dispute that is deemed to fall outside of the jurisdiction of the family courts of the various States?

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INTRODUCTION

This Petition is the latest and saddest chapter of a book that chronicles the lengths to which one man will go to retract a promise that he made to his wife and family following his unforeseen and unexplained exodus from his family residence after thirty-one years of seemingly blissful marriage. In the aftermath of a dishonorable act, the Petitioner attempted to "do the right thing" by agreeing to a marital property division that would provide some type of economic continuity and harmony to the family that he left in ruins upon his departure. After sleeping on his decision for approximately fifteen (15) months, the Petitioner awoke to use every level of the court system in the State of South Carolina in an unsuccessful attempt to undo his promise. Having petitioned this Court, the Petitioner has finally reached his court of last resort. The Respondent urges this Court to reject the petition and in doing so to end the Petitioner's quest to break a promise.

STATEMENT OF THE CASE

After a thirty-one year marriage in South Carolina, Petitioner James Moore (formerly known as James Coon) left his wife and family without notice to take up an adulterous relationship with his paramour (and current wife, Margaret Moore) in Cardiff, California. Respondent Gay Coon returned home from work to find that her husband had packed most, if not all, of his clothing for an alleged business trip. Following months of lies from her husband regarding his whereabouts and through the services of a private detective, the Petitioner was finally found residing with his lover in California. A divorce action followed in South Carolina. The Petitioner was

served process and consented to personal and subject matter jurisdiction over the proceedings in South Carolina.

By agreement, the parties determined the allocation of their marital estate for themselves, including specifically the allocation of the Petitioner's retired military account. With regard to the military retirement account, the parties had a very specific design. As there remained approximately nine (9) years of payments owed on the former marital residence which was to become the Respondent's sole property, and in order to allow her a mechanism to remain in the home for that period of time, the parties agreed that for a period of nine (9) years, 100% of the Petitioner's military retirement pay would be directed to the Respondent and that after such time, the account would be divided evenly.

The parties freely and voluntarily signed a property settlement agreement memorializing their agreement. With the consent of the Petitioner, the Respondent then moved the Charleston County Family Court for approval of the agreement. Only after having obtained the Petitioner's specific written consent and acknowledgement that he understood that his agreement regarding property issues would be permanent and non-modifiable did the Honorable Charlie Segars-Andrews enter her order approving the property settlement agreement. No appeal from the final order was taken.

Following entry of the final order, the Petitioner began performance in accordance with the terms. After the Petitioner unilaterally changed the amount of the payment that he had been making to the Respondent (after approximately fifteen months of performance on the

agreement), the Respondent filed her Rule to Show Cause asking that the Petitioner be made to answer for his conduct in altering the terms of the court order. In response, the Petitioner filed his motion in accordance with Rule 60 of the South Carolina Rules of Civil Procedure, asserting for the first time that the trial court lacked jurisdiction to have approved his agreement to provide for his former wife greater than fifty (50%) percent of his military retirement account.

The South Carolina Court of Appeals subsequently reversed, holding that the lower court erred in vacating the original order approving the settlement on the grounds of lack of subject matter jurisdiction. On a petition for certiorari, the South Carolina Supreme Court affirmed the Court of Appeals, as modified, in its published decision cited herein. The order denying rehearing was entered on July 8, 2005.

REASONS FOR DENYING THE PETITION

I. Fractional Jurisdiction is an Oxymoron

The South Carolina Family Court unquestionably has subject matter jurisdiction to determine the division of marital estates for marriages in South Carolina, including specifically military retirement accounts. It is to this jurisdiction that the Appellant consented in presenting for approval the settlement agreement that he had reached with his wife. Petitioner would argue before this Court that although he consented to the jurisdiction of the South Carolina family court and although that court unquestionably has jurisdiction over the division of marital

property, the jurisdiction of the family courts as it pertains to military retirement accounts is incomplete.

In essence, Peitioner's position before this Court hangs tenuously on his belief in "fractional jurisdiction." That is, the power to grant jurisdiction over a "piece" of a subject matter, while presumably reserving out the balance of the same subject for some other place, time or tribunal. This non-existent concept should be juxtaposed against the prevailing body of American jurisprudence in which we have rules of law and rules of court which shape, guide and even limit exactly what a court may do within the confines of its jurisdiction. There are but two fundamental forms of jurisdiction: *en personam* and subject matter. It is a legal impossibility for any court to have jurisdiction over a piece of a person. Likewise, it is impossible for jurisdiction to be limited to a piece of a controversy. Courts either have jurisdiction over persons and/or subject matters or they do not. That is not to say, however, that legislative bodies cannot enact laws that limit or shape what any empowered court may do within the exercise of its jurisdiction. These limitations, however, are just that – limitations. Restrictions of authority within the scope of a court's jurisdiction do not and cannot constitute deprivations of that very same jurisdiction.

The distinction in the present case is not merely circuitous, as the Petitioner may advance, although the Respondent can understand why the Petitioner would describe it in such terms. The Petitioner recognizes that merely arguing about the manner in which a court of competent jurisdiction exercises its authority is just another way of claiming judicial error. While a jurisdiction defect may render an order voidable, under South Carolina law any alleged error of law must be appealed within

thirty (30) days of the date the allegedly erroneous order is entered or the right to seek redress for the error dies on the vine. If he is to receive any relief at all from the court's approval of his very own agreement, the Petitioner must make a jurisdictional argument. He is wrong.

II. The South Carolina Family Court Has Exclusive Jurisdiction Over the Division of Marital Property in South Carolina

South Carolina Code of Laws, Section 20-7-473 grants the State's family courts the jurisdiction to equitably apportion all "marital property." For married persons residing in South Carolina, the family court is the **only** court with the authority to make such divisions. It is equally clear under South Carolina law that vested retirement benefit accounts are marital property. See, S.C. Code Section 20-7-472(8). Not only does the family court have the jurisdiction to approve agreements between married persons regarding the proposed division of their marital property, the practice of parties entering into their own agreements is encouraged and great deference is afforded to their agreements by our courts. In fact, such agreements may even limit the family court's contempt power and/or declare that certain provisions (child custody and support issues excluded) may not be altered or modified. *Mosely v. Mosier*, 279 S.C. 348, 353, 306 S.E.2d 624, 627 (1983).[1] Thus, the central issue before the Court is

[1] The agreement in the present case provides in part: "It is the intention of the parties that this shall be a full, final and binding property settlement agreement between the parties. It is intended that this Agreement shall resolve any question as to equitable distribution of any and all property, real or personal, or any interest therein, and

(Continued on following page)

whether Congress, in enacting the Uniformed Services Former Spouses Protection Act, 10 U.S.C. § 1408, intended to deprive the family courts of the several states from exercising jurisdiction over military retirement accounts. It did not.

III. The Uniformed Services Former Spouses Protection Act, 10 U.S.C. § 1408 (USFSPA) neither Grants nor Limits Jurisdiction

It is perhaps ironic that the Petitioner relies on the provisions of the USFSPA when the primary purpose of the Act was to protect former spouses such of the Respondent. The USFSPA was enacted literally at the invitation of the Supreme Court through its decision in *McCarty v. McCarty*, 453 U.S. 210, 101 S.Ct. 2728, 69 L. Ed. 2d 589 (1981). In *McCarty*, the Supreme Court held that the supremacy clause of the United States Constitution precluded states from dividing retired military pay in accordance with state marital property laws. This was true because as of that time Congress had neither "authorized nor required the community property division of military retired pay." *Id.*, 453 U.S. at 232, 101 S.Ct. 2728. As a result, state laws allowing for the division of retirement accounts conflicted with federal law effectively leaving an ex-spouse without a forum. In recognition of the fact that "the plight of an ex-spouse of a retired service member is often a serious one," the Court invited Congress to fill in the gap through the enactment of new legislation.

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should such an issue arise in the future, this Agreement shall be binding and determinative of such an issue." (Agreement, p. 8).

Id., at 235, 101 S.Ct. 2728. The USFSPA was Congress' answer.

Through the USFSPA, the States were granted **authority** to address the matter of property allocation and division of military pension accounts between spouses in divorce actions. This grant of authority was not a grant of jurisdiction. The family court's of the various States had always possessed the exclusive jurisdiction to determine the division of marital property for married persons living within their borders. Furthermore, there was no federal tribunal with the jurisdiction to hear the same types of matters. Today, there is still no other tribunal to hear such disputes. Ultimately, the importance of the USFSPA was that it told the family courts for the first time that military retirement accounts are not immune to the jurisdiction of the family courts.

The exclusivity of the state family court jurisdiction to determine the division of marital property, to include military retirement accounts, is so clear that in many reported cases, parties have attempted to address a complaint regarding the proper allocation of a retired military account through a federal tribunal only to be told that the federal court lacks jurisdiction to hear the dispute. In *Mora v. United States*, 59 Fed. Cl. 234 (2003), the Plaintiff attempted to bring a direct action against the United States to recover payments withheld from him and paid to his ex-wife from his retired military pay. The order directing the payments issued out of the State of Oregon. Mora complained that the court lacked both personal and subject matter jurisdiction and sued to recover all payments made to his ex-spouse. In dismissing his suit, the Federal Claims court first observed that "the record contain[ed] no evidence that plaintiff contested the court

order within the required 30 day period." *Id.*, at 235. The court went on to observe that there is no direct action against the government for making payments pursuant to state court orders allocating retired military pay and, in fact, that they must follow all such orders that are "regular on its face." *Id.*, at 241. In order to be "regular on its face," the order need only be issued by a court of competent jurisdiction, be in apparently legal form and include nothing on its face to create reasonable notice that it issued without authority. *Id.*

Similarly, in *Brown v. Harms*, 863 F. Supp. 268 (E.D. Va. 1994), a military retiree's spouse attempted to commence an action in Federal District Court for the partition of a federal military retirement account. In dismissing the case, the District Court held that the USFSPA did not create federal subject matter jurisdiction to the District Court's over military retirement accounts. In fact, the decision goes on to explain that the USFSPA is not jurisdictional at all. Rather, it is a statute that allows courts that are otherwise courts of competent jurisdiction to divide a military retirement account, which prior to the enactment of the statute was impossible due to the supremacy clause of the United States Constitution.

In the present case, it is axiomatic that the family courts of the State of South Carolina have subject matter jurisdiction to divide retirement accounts accumulated over the course of a marriage as marital assets. It is also beyond dispute that the Peitioner was subject to and did not challenge either the personal jurisdiction or subject matter jurisdiction of our court at the time of the entry of his order approving the settlement. Thus, we are left at the heart of this dispute with the Petitioner's position that the USFSPA somehow creates a jurisdictional limit on the

family court, although it is clear that the statute creates no jurisdiction and equally clear that if it is even possible to piecemeal jurisdiction, that it created no forum in which the balance of the allegedly withheld jurisdiction may be exercised.

Alternatively, we are left with South Carolina's intuitive and sensible construction that what the Petitioner now attempts to do is to complain that the original family court judge who entered the order adopting his very own agreement erred by having entered an order that was arguably contrary to the provisions of the USFSPA. The significance is clear. Judicial errors (if in fact one was committed, which the Respondent strongly rejects) must be preserved for appeal by proper notice within thirty (30) days of the entry of the order. The Petitioner is forced into its strained construction by the inescapable reality that he did not so move and therefore the issue he wishes to address is not preserved for consideration.

Adopting Respondent's position requires only two things: first is the simple recognition of the jurisdiction of our family court to resolve disputes regarding retirement accounts to the extent that they were accumulated during the course of a marriage; second is the reaffirmation of the principal that alleged errors of law must be immediately appealed. Adopting the Petitioner's position on the other hand could only result in casting into doubt countless judgments in a number of forums in which the second bite at the appellate argument will come in the form of a cry of "fractionalized jurisdiction." Respondent respectfully requests the court to reject such confusion and deny the relief sought in this appeal.

IV. Judicial Errors Should Not Be Disguised in Jurisdictional Clothing

Recognizing the fact that he consented to the division of the property that he shared with his wife and recognizing that his consent and performance had taken place over a period of time that would preclude him from any other method of seeking to attack his own agreement, whether by claiming some type of contractual defense (coercion, duress, mistake, etc.) or by alleging judicial error, the Petitioner has dangerously tied his fortunes in this case to a jurisdictional argument. The Respondent respectfully suggests that "dangerous" is the appropriate word to describe Petitioner's attack when considering the invitation it may create for others who have tired of their agreements and/or judgments rendered against them to return to court outside of the rules for appeal and/or petitions for rehearing based on newly discovered evidence and using instead a "jurisdictional" argument as their key to the courthouse door. Accepting the Petitioner's approach is nothing short of an invitation to others to frame, create ways of couching their displeasure in jurisdictional terms, and in so doing, undermining the certainty of judgments entered perhaps years in the past. The Respondent urges this Court to reject such a precedent and to see this case as simply as she does. The Petitioner made a promise. He consented to the jurisdiction of the South Carolina Family Court to accept that promise. With his consent, the promise was made an order of the court.

CONCLUSION

From a jurisdictional point of view, the USFSPA created nothing. Jurisdiction over the division of retirement accounts accumulated during the course of a marriage has always been within the exclusive jurisdiction of the State family courts. The only change brought about by the USFSPA was to allow military retirement accounts to be considered in dividing marital estates outside of the umbrella of the Supremacy Clause of the United States Constitution. Following the enactment of the USFSPA, courts of "competent jurisdiction" were allowed to allocate military retirement accounts pursuant to a statutory scheme. To argue that the judge erred in disregarding the scheme is simply to allege judicial error, a matter which is subject to immediate appeal. This Court should reject the Petitioner's attempt to wrap an alleged judicial error in a jurisdictional blanket. To do so would create uncertainty in all judgments and invite endless appeals from disgruntled parties who have grown unhappy living with the consequences of their own judgments, verdicts and agreements. All the Petitioner has been asked to do in this case is to honor the terms of the agreement that he entered into freely and voluntarily. Respondent respectfully requests that he do so.

Respectfully submitted,

RONALD L. RICHTER, JR.
RICHTER LAW FIRM, P.A.
800 Wappoo Road
Charleston, SC 29407

Attorney for Respondent

December 6, 2005

Charleston, South Carolina